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No. 84-1462

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In The
Supreme Court of the United States
October Term, 1984

RONALD E. JAMES,
Petitioner,

v.

G. ALAN HUNTER,
GERALD GOLDBERG, and one or more unidentified agents of the California State Franchise Tax Board,
Respondents

ON PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

JOHN K. VAN DE KAMP
Attorney General

EDWARD P. HOLLINGSHEAD
Supervising Deputy Attorney General

DERRY L. KNIGHT
Deputy Attorney General

1515 K Street, Suite 511
Sacramento, California 95814
Telephone: (916) 324-5155

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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QUESTIONS PRESENTED

Does the United States District Court have jurisdiction of an action asserting civil rights violations as a result of alleged acts of state tax officials depriving petitioner/plaintiff of an opportunity, under state law provisions, to protest a tax assessment,

(1) where there is a plain, speedy, and efficient remedy in state court to review the assessment; and

(2) given the bar of the Eleventh Amendment?

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JURISDICTION

Petitioner cites 28 U.S.C. section 1254(1), which section does provide, as a general rule, the basis on which jurisdiction of this Court is invoked in a petition for writ of certiorari. Section 1254 does *not,* however, establish jurisdiction for the *district court*—indeed the district court properly concluded that it lacked jurisdiction of this action against state officials for acts performed in their capacity as tax administrators. This Court, should it

review the matter, must also deny the jurisdiction of the courts of the United States, where, as here, such jurisdiction does not affirmatively appear in the record on which it is called to act. (*Parker v. Ormsby* (1891), 141 U.S. 81, 11 S.Ct. 912, 35 L.Ed. 654; see also *King Iron Bridge, etc. Co. v. Otoe County* (1887), 120 U.S. 225, 7 S.Ct. 552, 30 L.Ed. 623.)

STATEMENT OF THE CASE

By a Complaint for Damages filed August 3, 1981 in the United States District Court for the Eastern District of California (E.R.[1] Doc. No. 1), petitioner sought, inter alia, damages and an injunction restraining enforcement of a State of California Franchise Tax Board (hereinafter "Board") lien. Respondent G. Alan Hunter is Director of the Collection Bureau of the Board (see E.R. Doc. No. 1, Exh. H) and respondent Gerald Goldberg is the Executive Officer of the Board. All respondents are agents of the Board (E.R. Doc. No. 1, ¶ III).

A motion to dismiss was filed by respondents on August 31, 1981 (E.R. Doc. No. 7), on the grounds, inter alia, that the federal courts lack jurisdiction by virtue of the bar of the Eleventh Amendment and 28 United States Code section 1341.

On September 3, 1981, the district court issued an order denying petitioner's motion for a restraining order

1. Excerpts of Record filed with Ninth Circuit Court of Appeals will be referred to herein as "E.R." Petitioner has apparently chosen not to bring the entire record before this Court.

and a preliminary injunction (E.R. Doc. No. 9). Thereafter, on December 30, 1982, the Honorable Edward Dean Price, United States District Judge, after considering the matter de novo, issued an order approving the February 10, 1982 Magistrate's Recommendation on respondents' Motion to Dismiss (Suppl. Appen. to Petn. for Writ of Certiorari). The court's order directed dismissal of petitioner's action since the existence of a refund action, such as is provided by the California Personal Income Tax Law—which is a "plain, speedy and efficient remedy"—leaves the federal courts without jurisdiction to entertain petitioner's action. The court therefore found it unnecessary to consider the alternative grounds urged by respondents in support of their motion for dismissal.

Judgment dismissing petitioner's action was filed January 24, 1983 and entered January 24, 1983 (E.R. Doc. No. 18). Plaintiff's notice of appeal was then filed January 24, 1983 (Suppl. Appen. to Petn. for Writ of Certiorari).

The Ninth Circuit Court of Appeals affirmed the district court's dismissal of the action by an unpublished "memorandum" opinion filed April 6, 1984 (Appen. to Petn. for Writ of Certiorari).

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SUMMARY OF ARGUMENT

The federal courts lack jurisdiction to entertain petitioner/plaintiff's action against State of California officials, pertaining to a tax assessment for which a state court remedy is available. The principle of comity bars petitioner's action (*Fair Assessment in Real Estate*

Ass'n. v. McNary (1981), 454 U.S. 100, 116, 102 S.Ct. 177, 70 L.Ed.2d 271) since California's administrative and judicial remedies for review (Cal. Rev. & Tax. Code, §§ 19081 et seq., 18590 et seq. and 19051 et seq.) are clearly "plain, speedy and efficient." (*Rosewell v. LaSalle Nat. Bank* (1981), 450 U.S. 503, 101 S.Ct. 1221, 67 L.Ed. 2d 464.) Also, both the "Tax Injunction Act" (28 U.S.C. § 1341) and the Eleventh Amendment of the United States Constitution unquestionably deprive the federal courts of jurisdiction of petitioner's action. The district court dismissal was proper and the petition before this Court should be denied.

ARGUMENT

Introduction

The Ninth Circuit Court of Appeals properly affirmed the decision which dismissed petitioner's action, relying on only one of several meritorious grounds which were asserted by respondents. The federal courts clearly lack jurisdiction to entertain actions against state tax officials for conduct, as alleged in petitioner's complaint, pertaining to a state tax assessment for which a plain, speedy, and efficient remedy exists in state court.

Petitioner argues, as he did in the lower courts, the general proposition that federal courts have jurisdiction to entertain civil rights actions for denials of due process. Petitioner fails, however, to establish that the federal courts have jurisdiction to entertain such an action against State of California officials, pertaining to a tax assessment for which a state court remedy is clearly available.

The principle of comity bars the action. Both 28 United States Code section 1341 and the Eleventh Amendment of the United States Constitution also unquestionably deprive the federal courts of jurisdiction of petitioner's action. The district court dismissal was proper, and the petition before this Court should be denied.

I.

PETITIONER'S ACTION WAS PROPERLY DISMISSED SINCE THE FEDERAL COURTS LACK JURISDICTION.

A. The Principle Of Comity Bars Petitioner's Action.

The principle of comity serves as a bar to federal courts granting damages relief in state tax cases, including a Civil Rights action. In the words of this Court,

> "[W]e hold that taxpayers are barred by the principle of comity from asserting [42 U.S.C.] § 1983 actions against the validity of state tax systems in federal courts. Such taxpayers must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate, and complete [fn. omitted], and may ultimately seek review of the state decisions in this Court." (*Fair Assessment in Real Estate Ass'n. v. McNary, supra,* 454 U.S. 100.)

The California Revenue and Taxation Code provisions provide a readily available and wholly effective administrative mechanism and state court judicial remedy for aggrieved taxpayers. Taxpayers have available a state court refund action to obtain judicial review of their constitutional claims. (Cal. Rev. & Tax. Code, § 19081 et seq.; see also Cal. Rev. & Tax. Code, §§ 18590 et seq. [available prepayment administrative remedy of "protest," hear-

ing, etc.] and 19051 et seq. [administrative claim for refund procedure].)

California's remedies are clearly "plain, speedy and efficient." (*Rosewell v. LaSalle Nat. Bank, supra,* 450 U.S. 503.) In *Rosewell,* this Court rejected the claim that an Illinois remedy was inadequate because the taxpayer had to pay an assessment on his property before obtaining a hearing on his contention that the assessment was unlawful, because the process took two years, and because the state did not pay a successful protestant interest on the wrongfully collected assessments. The court, in rejecting the contention of inadequacy of state remedy, quotes a Senate report on the Tax Injunction Act evidencing that Congress knew that many states provided a refund action as the "exclusive remedy" for the erroneous or wrongful collection of taxes, which remedy Congress intended to constitute the standard for "plain, speedy and efficient" remedies.

As noted above, California provides *both* prepayment administrative remedies (which is where petitioner contends his rights were violated) (Cal. Rev. & Tax. Code §§ 18590 et seq. and 19051 et seq.) and a state judicial refund action for review of such contentions. (Cal. Rev. & Tax. Code, § 19081 et seq. These procedures, which are virtually identical to the procedures reviewed by this Court in *California v. Grace Brethren Church* (1982), 457 U.S. 393, 102 S.Ct. 2498, 73 L.Ed.2d 93, have been consistently held, as a matter of law and without a single instance of deviation, to be plain, speedy and efficient. (*Capitol Industries-EMI, Inc. v. Bennett* (9th Cir. 1982), 681 F.2d 1107; *Aronoff v. Franchise Tax Board of the State of California* (9th Cir. 1965), 348 F.2d 9; *Randall v. Fran-*

chise Tax Board of State of California (9th Cir. 1971), 453 F.2d 381; see also *Corbett v. Printers & Publishers Corporation* (9th Cir. 1942), 127 F.2d 195, 197.) *Rosewell* similarly dictates this conclusion.

Accordingly, since petitioner failed to exhaust his available state administrative and judicial remedies, his action in federal court was properly dismissed for lack of jurisdiction.

B. 28 United States Code Section 1341 Bars The Federal District Courts From Hearing The Instant Case.

The existence of a refund action, as provided by the California Personal Income Tax Law,[2] also invokes the restraint of the "Tax Injunction Act," 28 United States Code section 1341. The provisions of section 1341 also deprive the federal courts of jurisdiction. (*Rosewell v. LaSalle Nat. Bank, supra,* 450 U.S. 503; *Kelly v. Springett* (9th Cir. 1975), 527 F.2d 1090, 1093-1094; *Bland v. McHann* (5th Cir. 1972), 463 F.2d 21, cert. den. (1973) 410 U.S. 966, 93 S.Ct. 1438, 35 L.Ed.2d 700.)

C. The Principles Of Federal Equity Also Dictate The Withholding Of Relief.

In any event, the district court properly abstained from accepting jurisdiction in this case where more than adequate administrative and judicial state remedies are available to the taxpayer. (*Great Lakes Dredge & Dock Co. v. Huffman* (1943), 319 U.S. 293, 63 S.Ct. 1070, 87

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2. The refund action is applicable to taxes collected by withholding in issue in this case. (Cal. Rev. & Tax. Code, § 18820.)

L.Ed. 1407.) This principle of federal equitable jurisdiction which restrains the federal court from interference with the internal fiscal operations of the state is applicable to actions brought under section 1981 et seq. of 42 United States Code. (*Fair Assessment in Real Estate Ass'n. v. McNary, supra,* 454 U.S. 100.)

D. The Eleventh Amendment To The United States Constitution Also Deprives The Federal Courts Of Jurisdiction.

Unchanged since its adoption in 1798, the Eleventh Amendment to the United States Constitution provides as follows:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

This Court has consistently held that an unconsenting state is immune from suits brought in federal court by her own citizens as well as by citizens of another state. (*Hans v. State of Louisiana* (1890), 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842; *Duhne v. New Jersey* (1920), 251 U.S. 311, 40 S.Ct. 154, 64 L.Ed. 280; *Great Northern Life Ins. Co. v. Read* (1944), 322 U.S. 47, 64 S.Ct. 873, 88 L.Ed. 1121; *Parden v. Terminal R. of Ala. State Docks Dept. Co.* (1964), 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233; *Employees v. Dept. of Public Health and Welfare* (1973), 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251.) It is also well established that even though a state is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment. In *Ford Motor Co. v. Dept.*

of Treasury (1945), 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389, this Court said:

> "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." (*Id.*, at p. 464.)

Thus, the rule has evolved that a suit by private parties seeking to impose a liability which ultimately will be paid from public funds in the state treasury is barred by the Eleventh Amendment. (*Great Northern Life Inc. Co. v. Read, supra,* 322 U.S. 47; *Kennecott Copper Corp. v. Tax Comm'n* (1946), 327 U.S. 573, 66 S.Ct. 745, 90 L.E. 861.)

As petitioner alleges, respondents are employees of the California Franchise Tax Board. As is evident from the complaint, the complained-of-conduct by the respondents occurred while respondents were carrying out their duties as state employees. In such an action, while the individual may be named as a nominal defendant, the State of California treasury will to a virtual certainty be responsible for any judgment which may be granted to plaintiff. (Cal. Gov. Code, § 825.) Absent a waiver by the State of California, the Eleventh Amendment is, therefore, a bar to petitioner's action.

1. There Has Been No Waiver By California Of Eleventh Amendment Protection.

In deciding whether a state has waived its constitutional protection under the Eleventh Amendment, this Court has held that a waiver will be found only where stated "by the most express language, or by such over-

whelming implication from the text as [will] leave no room for any other reasonable construction." (*Murray v. Wilson Distilling Co.* (1909), 213 U.S. 151, 171, 29 S.Ct. 458, 464, 53 L.Ed. 742.) As stated in the court's decision in *Edelman v. Jordan* (1974), 415 U.S. 651, 673, 94 S.Ct. 1347, 1361, 39 L.Ed.2d 662:

> "We see no reason to retreat from the Court's statement in *Great Northern Life Insurance Co. v. Read,* 332 U.S., at 54 . . . (footnote omitted):
>
> > '[W]hen we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found.'"

To the extent that the State of California administers the personal income tax law, it clearly has not waived such immunity. To the contrary, the state has established in state courts a "plain, speedy, and efficient remedy" for determining whether taxes have been erroneously or illegally collected or computed. (Rev. & Tax Code, §§ 19051 et seq., 19081 et seq.; *Aronoff v. Franchise Tax Board, supra,* 348 F.2d 9; *Randall v. Franchise Tax Board, supra,* 453 F.2d 381; see also Cal. Gov. Code, § 860.2.) Petitioner therefore cannot meet his burden of establishing that the State of California has waived its immunity from this kind of suit, or this particular suit, in federal court. (*Murray v. Wilson Distilling Co., supra,* 213 U.S. 151, 172-173; *Whitner v. Davis* (9th Cir. 1969), 410 F.2d 24, 29; *Clark v. State of Washington* (9th Cir. 1966), 366 F.2d 678, 680.)

2. The Eleventh Amendment Bar Is Applicable To Section 1983 Civil Rights Actions.

The fact that petitioner/plaintiff brought this suit in part under 42 United States Code section 1983 et seq. is

of no consequence insofar as the bar of the Eleventh Amendment is concerned.[3] It is now firmly established that section 1983 does not constitute an abrogation of the Eleventh Amendment immunity of the states. In *Quern v. Jordan* (1979), 440 U.S. 332, 99 S.Ct. 1139, 39 L.Ed.2d 338, this Court concluded that Congress did not intend by the general language of section 1983 "to override the traditional sovereign immunity of the States." (*Id.* at p. 341 (relying on *Alabama v. Pugh* (1978), 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (per curiam) and *Edelman v. Jordan, supra,* 415 U.S. 651).)

CONCLUSION

For the foregoing reasons, it is respectfully requested that the petition for writ of certiorari herein be denied.

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General

EDWARD P. HOLLINGSHEAD
Supervising Deputy Attorney General

DERRY L. KNIGHT
Deputy Attorney General

1515 K Street, Suite 511
Sacramento, California 95814
Telephone: (916) 324-5155

Attorneys for Respondents

3. To the extent petitioner/plaintiff bases his claim on violations of *state law* (see, Petn. for Writ herein, p. 6), his claim is, of course, also barred by the Eleventh Amendment. (*Pennhurst State School & Hosp. v. Halderman* (1984) — U.S. —, 104 S.Ct. 900, 909-911, 79 L.Ed.2d 67, 80-82.)